Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

Nos. 03-1116, -1120 and -1274

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
GOVERNOR OF MICHIGAN, *et al.*, *Petitioners*,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

JUANITA SWEDENBURG, *et al.*, *Petitioners*,
v.
EDWARD D. KELLY, CHAIRMAN,
NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
STATE LIQUOR AUTHORITY, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION IN SUPPORT OF PETITIONERS IN *GRANHOLM* AND RESPONDENTS IN *SWEDENBURG*

CLAUDETTE P. MILLER
Counsel of Record
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, IL 60602
(312) 977-4390

Counsel for Amicus Curiae

QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

TABLE OF CONTENTS

Page

Table of Authorities iii

Consent to File 1

Interest of *Amici* 1

Summary of Argument 2

Argument 3

I. The Commerce Clause Has Underpinned A Strong American Economy, But Its Unfettered Application Is Not Appropriate As To Liquor 3

II. Alcohol Is Responsible For More Social And Economic Damage To U.S. Society Than All Other Drugs Combined 7

III. Illinois' Liquor Law Is Designed To Regulate Imported Liquor 10

IV. This Case Will Have A Substantial Impact On The Ability Of Illinois And Other States To Maintain Control Of Imported Alcohol 12

V. The *Swedenburg* Analysis Facilitates State Efforts To Control Improper Alcohol Use 14

Conclusion 16

Appendix 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Allstate Beer, Inc. v. Julius Wile Sons & Co. Inc.,
479 F. Supp. 605 (N.D. Ga. 1979) 5

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848, 853 (7th Cir. 2000) 5

Daley v. Jack's Tivoli Liquor Lounge, Inc.,
254 N.E.2d 814, 819, 118 Ill. App. 2d 264 (Ill. App. Ct. 1969) 11

Daley v. Rifkin,
228 N.E.2d 224, 226, 84 Ill. App. 2d 467 (Ill. App. Ct. 1967) 11

Erfor Corp. v. State of Illinois Liquor Control Commission,
47 Ill. App. 3d 72, 361 N.E.2d 776 (1st Dist. 1977) 10

Heald v. Engler, 342 F.3d 517 (6th Cir. 2003) 16

Jager v. Illinois Liquor Control Comm'n,
392 N.E.2d 176, 182, 74 Ill. App. 3d 33
(Ill. App. Ct. 1979) 14

Levendis v. Cobb County,
250 S.E.2d 460, 242 Ga. 592 (Ga. 1979) 5

National Bellas-Hess, Inc. v. Department of Revenue,
386 U.S. 753, 87 S. Ct. 1389 (1967) 13

Table of Authorities continued

Oregon. Waste Systems, Inc. v. Department of Environmental Quality,
511 U.S. 98, 114 S.Ct. 1345, 1349 (1994) 3

Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurant, Inc.,
669 P.2d 265, 1983 Ok. 77 (Ok. 1983) 5

Quill Corporation v. North Dakota,
504 U.S. 298, 112 S. Ct. 1904 (1992) 13, 15

Show of Shows, Inc. v. Illinois Liquor Control Comm'n,
230 N.E.2d 268, 271, 86 Ill. App. 2d 109 (Ill. App. Ct. 1967) 11

Spiros Lounge, Inc. v. State of Illinois Liquor Control Comm'n,
423 N.E.2d 1366, 1372, 98 Ill. App. 3d 280, 287 (Ill. App. Ct. 1981) 11

Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004) 14, 16

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Art. I, § 8, cl. 3 ..... *passim*
U.S. Constitution Amend. XVIII 5
U.S. Constitution Amend. XXI, § 2 ..... *passim*

STATUTES:

21 U.S.C. § 841 4

Table of Authorities continued

Illinois Liquor Control Act of 1934:
235 Ill. Comp. Stat. 5/1-1(b) 11
235 Ill. Comp. Stat. 5/5-1(c) 11
235 Ill. Comp. Stat. 5/6-8 11
235 Ill. Comp. Stat. 5/6-16 11
235 Ill. Comp. Stat. 5/6-29 12
235 Ill. Comp. Stat. 5/6-29.1 ..... 10, 12
235 Ill. Comp. Stat. 5/8-1 11
235 Ill. Comp. Stat. 5/8-2 ..... 11, 12
235 Ill. Comp. Stat. 5/8-12 11
235 Ill. Comp. Stat. 5/8-14 12

Illinois Beer Industry Fair Dealing Act:
815 Ill. Comp. Stat. 720/2 10

OTHER AUTHORITIES:

Adam Badawi, *Uneasy Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331 (Date) 3

Linda Carroll, *Fetal Brains Suffer Badly from Effects of Alcohol*, New York Times,
Nov. 4, 2003, available at http://www.nytimes.com/ 9

Frank J. Chaloupka et al., *The Effects of Price on Alcohol Consumption and Alcohol-Related Problems*, 26 NAT'L ACAD. SCI. 1, 22 (2002) 6

Chicago Magazine, *The Dry Season*, July 2003 6

Table of Authorities continued

Forrester Research, Inc., *The Growth Of Multichannel Retailing* 14

Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 8, 989 (Feb. 26, 2003) 9

B.F. Grant & D.A. Dawson, *Age of Onset of Alcohol Use and its Association with DSM-IV Alcohol Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiological Survey*, J. SUBSTANCE ABUSE, 9, 103-110 (1997) 9

Glen R. Hanson & Ting-Kai Li, *Public Health Implications of Excessive Alcohol Consumption*, 289 JAMA 8, 1031 (Feb 26, 2003) 7, 9

National Institute on Alcohol Abuse and Alcoholism (NIAA), *Strategic Plan 2001-2005* at 20 at http://www.niass.nih.gov 8

National Survey: 80% of College Students Say Peers Likely to Purchase Alcohol Online (April 4, 2000) at http://www.texassafetynetwork.org/news/reporter/eightypercent 14

New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales, Oct. 22, 2003 at http://www.cheaphostingdirectory.com/news/20031022alcohol.htm (citing a 2003 Wirthlin Worldwide survey) 5

Table of Authorities continued

Christian Science Monitor: *New Face of Underage Drinking: Teenage Girls* (July 13, 2004) 9

Press Release, *Governor Blagojevich Calls for More Federal Funding to Prevent the Dangers of Binge Drinking: Study Shows Heavy Drinking Isn't Just on College Campuses* (April 7, 2004) 7

Report by the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 5* (July 2003) 4, 6, 8

Report of the National Academy of Sciences, *Reducing Underage Drinking: A Collective Responsibility*, at 11 (September 2003) at http://www.marininstitute.org/alcohol_policy/UnderageDrinking_Exec_Summary.pdf 6

Douglas Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 Utah L. Rev. 111 at 131 3

The Three-Tier System: Texans Overwhelmingly Reject Direct Shipment of Alcohol (2000) at http://www.texassafetynetwork.or/internet/three/survey.htm (citing a statewide public opinion poll) 5

CONSENT TO FILE

Consents to the filing of any *amicus* briefs in each of the consolidated cases were filed by the parties on July 9, 2004, July 13, 2004 and July 14, 2004.

INTEREST OF *AMICI*[1]

The Illinois Alcoholism and Drug Dependence Association (IADDA) is an Illinois-based not for profit established in 1967. IADDA is involved in professional training, career development and advocacy for providers in the field of alcohol and drug dependency prevention, counseling and diversion. IADDA represents more than 100 prevention and treatment agencies. A list of its members is attached in the Appendix.

IADDA advocates for sound public policy to foster healthier families and safer communities. Its objectives are to work for effective treatment for addicted or drug-dependent people and for prevention, particularly among youth. Its public policy advocacy works to promote healthier individuals and safer communities by helping avoid the problems of dependence.

IADDA partners with two prevention programs. One, Illinois Teen Institute, operates an acclaimed prevention and positive peer influence program directed at teenagers. It involves youth in community planning for prevention of addiction and dependence. Its sponsored program, Teens Reaching For And Achieving Excellence (TRAX) involves teen leaders workshops around the state to

---

[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

prepare them and involve them in the anti-dependence and prevention drives. The other program, Operation Snowball, creates youth/adult partnerships to fight against use and dependence on tobacco, alcohol, and other drugs. Operation Snowball has 150 chapters working to involve communities in healthy decisionmaking.

IADDA maintains a web site linking both dependence providers and those involved in its affiliate efforts to government. http://www.iadda.org. The site facilitates access to the Illinois General Assembly, regulatory agencies, and welfare policymakers.

SUMMARY OF ARGUMENT

The Constitutional law approach to the issue of direct shipping advocated by the Sixth Circuit treats liquor like any other commodity, the untrammeled trade of which should be promoted and protected by the Commerce Clause. Such an approach is at variance with the national welfare, public opinion, and the plain language of the Twenty-First Amendment to the United States Constitution.

It is indisputable that liquor is a dangerous drug and the drug that imposes the highest social and economic costs on American society. Many authorities, including those relied upon by direct shipping advocates, recognize that states legitimately may use taxes and other regulatory measures to promote temperance and curb alcohol abuse. Particularly now with the explosive growth of Internet sales, the Sixth Circuit's approach will wreak havoc on a state's abilities to regulate and control access to this dangerous drug.

ARGUMENT

I. The Commerce Clause Has Underpinned A Strong American Economy, But Its Unfettered Application Is Not Appropriate As To Liquor

Under the Articles of Confederation that preceded the United States Constitution, import-export duties and regulations hindered the development of a national economy. *See* Adam Badawi, *Uneasy Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331 (2003). The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, has been a major force in creating a national free market. The Commerce Clause not only expressly conveys to Congress the power to regulate interstate trade, but has long been accepted as denying that power to state governments by negative implication. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994).

As the authorities cited by the parties in the cases now before this Court on writ of *certiorari* make clear, a notable exception to the plenary authority of Congress under the Commerce Clause is the authority -- however broad or narrow -- to regulate liquor granted to the states by Section 2 of the Twenty-First Amendment of the Constitution.

Some commentators and some decisions have found further cause or function for the negative implication of the Commerce Clause. *See, e.g.*, Douglas Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 Utah L. Rev. 111, 131 (2004). Arguing that it provides a useful tool for invalidating protectionism or special interest legislation, they contend it has been invaluable in fostering a free market in the United States and that largely because of it,

American consumers get minimum prices and optimum economic performance. By placing the interstate portion of the economy beyond the interference of much state government regulation, the Constitution has facilitated a more *laissez-faire* economic system.

The parties opposing direct shipping laws make no attempt to hide the fact that they seek to promote and protect their ability to make liquor as widely and cheaply available as possible. In their Brief in Opposition to the Petitions for Writs of Certiorari, the Respondents in the Sixth Circuit cases open and close with references to and repeatedly cite a Report by the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 5* (July 2003) ("Report"). In the Report the staff concludes:

> states could significantly enhance consumer welfare by allowing direct shipment of wine to consumers. Through direct shipping, online wine sales offer consumers lower prices and greater selection.

Id. at 3.

There is more to the issue before this Court than free trade, however. The fact that nearly 40 state attorneys general have added their voices in favor of alcohol regulation and against open shipping testifies to that.

The American public does not believe that minimum pricing and maximum consumption is desirable for all commodities and all industries. Congress in some cases has responded to that public concern by banning or tightly regulating the commodity with Commerce Clause authority. Heroin is an example. *See* 21 U.S.C. § 841.

Alcohol is an even better example. Congress twice has placed before the states constitutional amendments to

regulate alcohol as an alternative to exclusive Commerce Clause regulation. Both were ratified by the states and both dealt with alcohol. The Eighteenth Amendment introduced Prohibition and banned alcohol. The Twenty-First Amendment repealed Prohibition and granted regulatory authority to the states over the transportation or importation of alcohol.

Courts have recognized the power of states to ban alcohol totally, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), to permit political subdivisions to ban it, *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F. Supp. 605 (N.D. Ga. 1979), and to ban it at specific times or in particular places. *Levendis v. Cobb County*, 250 S.E.2d 460, 242 Ga. 592 (Ga. 1979); *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurant, Inc.*, 669 P.2d 265, 1983 Ok. 77 (Ok. 1983).

Most Americans do not want to maximize the availability and consumption of alcohol by minimizing price. In a 2003 national poll by Wirthlin Worldwide, 83% of respondents agreed that Internet sales should not be allowed because they would give minors easier access to alcohol. *New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales*, Oct. 22, 2003, *at* http://www.cheaphostingdirectory.com/news/20031022alcohol. (citing a 2003 WirthlinWorldwide survey). 77% of Americans oppose permitting direct sales of alcohol by Internet or mail, as do 71% of self-identified alcohol consumers, and 85% of non-drinkers. *Id.* In Texas during 2000, a poll found that 71% disagreed with the statement: "Manufactures of any product including alcoholic beverages, should have the right to sell directly to consumers over the Internet." *The Three-Tier System: Texans Overwhelmingly Reject Direct Shipment of Alcohol* (2000), *at* http://www.texassafetynetwork.org/internet/three/survey.htm

(citing a statewide public opinion poll). In Chicago, Illinois, 24 partial and 16 full precincts have voted to go "dry" since 1992. Mayor Richard Daley has noted that a "bad liquor establishment can tear the fabric of a neighborhood and send it into decline." Chicago Magazine, *The Dry Season*, July 2003.

As the foregoing illustrates, prudent use is a more favored social objective than wide-open access where liquor is concerned. This should be recognized in evaluating the competing schemes of legal analysis for state regulation of alcohol.

The Report acknowledges that "some states may explicitly pursue a policy of elevating prices above competitive levels to promote temperance." *Id.* at 26-27. In fact, the National Academy of Sciences has recommended that "Congress and state legislatures should raise excise taxes to reduce underage consumption ..." Report of the National Academy of Sciences, *Reducing Underage Drinking: A Collective Responsibility* at 11 (September 2003) *at* http://www.marininstitute.org/alcohol_policy/UnderageDrinking_Exec_Summary.

A 2002 article summarizing the economic research on the effect of price on alcohol consumption found that:

> This research, which has used a wide variety of data, generally has concluded that increases in the price of alcoholic beverages lead to reductions in drinking and heavy drinking as well as in the consequences of alcohol use and abuse.

Frank J. Chaloupka *et al.*, *The Effects Of Price On Alcohol Consumption and Alcohol-Related Problems*, 26 Nat'l. Acad.

Sci. 1, 22 (2003). One of the studies commended in the review found:

> After controlling for State and year effects, the investigators concluded that a $1 increase in the per gallon liquor tax can reduce gonorrhea rates by 2.1 percent; furthermore a beer tax increase of 20 cents per six-pack can reduce gonorrhea rates by 8.9 percent. Similar, or even somewhat larger, effects of liquor and beer taxes were found for syphilis rates.

See id. at 30.

II. Alcohol Is Responsible For More Social And Economic Damage To The American Public Than All Other Drugs Combined.

Statistics on violence, divorce, crime, fetal alcohol syndrome, spousal and child abuse, DUI killings and maimings, and lost work time clearly demonstrate the terrible social and economic cost our society pays for the imprudent use of alcohol.

The economic cost of liquor abuse in America is estimated at $185 billion, while that for illicit drugs is estimated at $161 billion. Underage drinkers and adult excessive drinkers account for an aggregate 50.1% of total alcohol consumption in the United States. Glen R. Hanson & Ting-Kai Li, *Public Health Implications of Excessive Alcohol Consumption*, 289 JAMA 8, 1031 (Feb. 26, 2003). Approximately one-third of U.S. adults exceed the guidelines defining excessive consumption. *Id.* at 1032. A recent Illinois state government survey found that 10% of eighth graders and 36% of twelfth graders reported binge drinking. Press Release, *Governor Blagojevich Calls for More Federal Funding to Prevent the Dangers of Binge Drinking: Study Shows Heavy Drinking Isn't Just on College Campuses*

(April 7, 2004). The Report that the direct shipping advocates repeatedly cite confirms what should be sobering statistics on youth access to alcohol:

> In 2002 approximately 68% of eighth graders, 85% of tenth graders, and 95% of twelfth graders said that it is "fairly easy" or "very easy" to get alcohol. Underage alcohol use imposes significant costs, in both human terms and economic terms. Although the numbers are very difficult to quantify, one study estimated that, in 1996, the total cost of underage drinking—including traffic crashes, violent crimes, burns, drowning, suicide attempts, fetal alcohol syndrome, alcohol poisoning, and treatment—was $52.8 billion.

Id. at 11.

Those numbers are significant for many reasons. Alcohol is associated with violence. The National Institute on Alcohol Abuse and Alcoholism (NIAA) has found that:

> Excessive alcohol consumption is frequently a factor in violence toward women. These events range from being the recipient of verbal aggression . . . to battery, rape, and death. Recent findings among women who reported sexual assaults include higher levels of alcohol consumption, both their own and the perpetrators, and sexual risk-taking.

NIAA, *Strategic Plan 2001-2005* at 20 *at* http://www.niaa.nih.gov. 50-60 % of male alcoholics report violent behavior toward women. *Id.*

Further, "[a]lcohol abuse is associated with high-risk sexual behavior and injection drug use, two of the major modes of human immunodeficiency virus transmission."

Hanson & Li, *supra*, at 1031. *The Christian Science Monitor* noted in a report on underage drinking that:

> experts say (sex) . . . is a factor advertisers exploit, often to the detriment of girls more than boys. 'Bad girls make good company,' reads one ad for Cuervo rum. In a Martell Cognac ad, a sultry woman is on display with a plea to 'be at least capable of bad.'

New Face of Underage Drinking: Teenage Girls, Christian Science Monitor, July 13, 2004.

The adverse impact of alcohol on the young is well-established. Drinking increases "the chances that teenagers will become adult heavier drinkers with alcohol problems later in life". Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 8, 989 (Feb. 26, 2003); B.F. Grant & D.A. Dawson, *Age of Onset of Alcohol Use and its Association with DSM-IV Alcohol Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiological Survey*, J. SUBSTANCE ABUSE, 9, 103-110 (1997). Prenatal contact with alcohol is highly detrimental: "We found more serious cognitive impairment in relation to alcohol than cocaine or other drugs, including marijuana or smoking" (Dr. Sandra Jacobson, Wayne State University). Linda Carroll, *Fetal Brains Suffer Badly from Effects of Alcohol*, N.Y. Times, Nov. 4, 2003, available at http://www.nytimes.com/. "Fetal alcohol syndrome, a serious disorder affecting brain function, is the leading preventable birth defect in the U.S." *Id.*

III. Illinois' Liquor Law Is Designed To Regulate Imported Liquor

Illinois is home to many large liquor retailers, such as Sam's Wine & Spirits, Binny's, and Walgreen's. Illinois, however, has relatively few wineries and distilleries and no major breweries, so a very high percentage of the alcohol sold is imported. Illinois law looks to and derives its authority from the Twenty-First Amendment. For example, the direct shipping provision of the Illinois Liquor Control Act of 1934 provides:

> Pursuant to the Twenty-First Amendment of the United States Constitution allowing states to regulate the distribution and sale of alcoholic liquor and pursuant to the federal Webb-Kenyon Act declaring that alcoholic liquor shipped in interstate commerce must comply with state laws, the General Assembly hereby finds and declares that selling alcoholic liquor from a point outside this State through various direct marketing means, such as catalogs, newspapers, mailers and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State.

235 Ill. Comp. Stat. 5/6-29.1 (1934). *See also* Illinois Beer Industry Fair Dealing Act, 815 Ill. Comp. Stat. 720/2 ("This Act is promulgated pursuant to authority of the State under the provisions of the Twenty-First Amendment to the United States Constitution ..."); *Erfor Corp. v. State of Illinois Liquor Control Commission*, 47 Ill. App. 3d 72, 361 N.E.2d 776 (Ill. App. Ct. 1977) ("The source of state power to control alcoholic beverages is the police power as fortified by the twenty-first amendment of the United States Constitution.")

In Illinois, retailers must determine age eligibility, observe operating hours, halt bawdy conduct and gambling, prevent disorderly conduct, and must not intoxicate patrons. 235 Ill. Comp. Stat. 5/6-16; *Spiros Lounge, Inc. v. State of Illinois Liquor Control Commission*, 423 N.E.2d 1366, 1372, 98 Ill. App. 3d 280, 287 (Ill. App. Ct. 1981) (sales to minor justified revocation); *Jager v. Illinois Liquor Control Commission*, 392 N.E.2d 176, 182, 74 Ill. App. 3d 33 (Ill. App. Ct. 1979), (repeated altercations as grounds for revocation); *Show of Shows, Inc. v. Illinois Liquor Control Commission*, 230 N.E.2d 268, 271, 86 Ill. App. 2d 109 (Ill. App. Ct. 1967) (solicitation of drinks by female employee warranted revocation); *Daley v. Jack's Tivoli Liquor Lounge*, 254 N.E.2d 814, 819, 118 Ill. App. 2d 264 (Ill. App. Ct. 1969) (sexual solicitation of police officer by prostitute vouched for by bartender warranted revocation); *Daley v. Rifkin*, 228 N.E.2d 224, 226, 84 Ill. App. 2d 467 (Ill. App. Ct. 1967) (evidence that bartender steered patron to prostitute justified revocation).

An Illinois importing distributor must be licensed as a distributor. 235 Ill. Comp. Stat. 5/5-1(c). An importing distributor must hold received alcohol in his warehouse from receipt until delivery to a retailer. 235 Ill. Comp. Stat. 5/6-8. A tax measured by volume is imposed on importing distributors and must be paid within 15 days of the month following delivery to a retailer. 235 Ill. Comp. Stat. 5/8-1; 235 Ill. Comp. Stat. 5/8-2. A distributor may only deliver to a licensed retailer. 235 Ill. Comp. Stat. 5/1-1(b).

Common carriers delivering alcohol into Illinois are required to file shipment manifests with the Illinois Liquor Control Commission. 235 Ill. Comp. Stat. 5/8-12. Consequently, reconciliation of the manifest information with the distributor tax filing and the warehouse inventory creates a fail-safe system for tax collection. If manifested product is

not in the inventory, it has been delivered and tax is due. 235 Ill. Comp. Stat. 5/8-2. Further, the tax document verifies that the distributor is only selling to retailers, not consumers, because the retailer must remit the sales tax to the state, accounting for the product. 235 Ill. Comp. Stat. 5/8-14. This distribution system means that sales to consumers go through licensed retailers and, as set forth above, Illinois polices retailers by inventory control to assure that taxes are paid and that sales are not made to minors or in furtherance of undesirable conduct.

Illinois permits some limited direct shipment to Illinois consumers, 235 Ill. Comp. Stat. 5/6-29, while maintaining a general prohibition. 235 Ill. Comp. Stat. 5/6-29.1. Retail inventory control is a regulatory scheme which serves to limit youth access.

IV. This Case Will Have A Substantial Impact On The Ability Of Illinois And Other States To Maintain Control Of Imported Alcohol

This Court now has before it decisions by the Second Circuit and the Sixth Circuit Courts of Appeals that take radically different views of the authority to regulate the importation of intoxicating liquor granted to the states by the Twenty-First Amendment and of the interplay between the Twenty-First Amendment and the dormant Commerce Clause. The very basis of their analyses differs.

The Second Circuit essentially looks at the scope of authority granted by the Twenty-First Amendment and allows states to regulate the importation of liquor in any rational fashion within that scope.

The Sixth Circuit, however, employs a two-step approach, starting with a dormant Commerce Clause analysis

and, if the state statute fails to pass a "strict scrutiny" test, proceeding on to determine whether the statute is somehow "saved" by the Twenty-First Amendment.

The Sixth Circuit approach effectively reduces the Twenty-First Amendment to surplusage and prevents a state from regulating alcohol in a fashion any stricter than it may regulate other goods in interstate commerce.

Consider:

- An out of state Internet seller with no physical presence in Illinois sells directly to an Illinois liquor retailer. Under the current law requiring physical presence to establish Commerce Clause nexus with a taxing state, the State of Illinois has no ability to impose a sales or use tax on the seller. *See Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992); *National Bellas-Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967). The state loses not only revenue, but the ability to use high taxes to depress consumption. Furthermore, the state must deploy more resources or divert existing resources to ensure that only licensees are selling, and selling within the limits of the law.
- Under Illinois law, a distributor must operate a strictly controlled warehouse. The inventory can be ascertained by the deliveries made and reported from the common carrier delivery manifests. The distributor pays a tax when product at the warehouse is delivered to a licensed retailer. However, if an Illinois distributor were to purchase product over the Internet and have it delivered directly to the retailer, tracking, regulating and taxing the product would become infinitely more difficult for the State. An untraceable, unidentified supply of liquor will

encourage failure to pay tax and lower prices, making liquor more accessible to minors.

According to a July 2004 report released by the National Governor's Association and the National Conference of State Legislators, sales over the Internet topped $104 billion in 2003, a nearly 40% jump over the previous year. *See* Forrester Research, Inc., *The Growth Of Multichannel Retailing*. The volume of sales over the Internet has grown exponentially in the years since this Court last interpreted the Twenty-First Amendment. There is no reason to think that growth will not continue.

This is undoubtedly true with respect to alcohol sales to minors, as well. A 2000 poll by Americans for Responsible Alcohol Awareness found 80% of college students say their peers are likely to purchase alcohol over the Internet, as no age verification is required. *National Survey: 80% of College Students Say Peers Likely to Purchase Alcohol Online* (April 4, 2000) *at* http://www.texassafetynetwork.org/news/reporter/eightypercent. Volume alone will render it increasingly hard for state's to prevent and police such sales.

V. The *Swedenburg* Analysis Facilitates State Efforts To Control Improper Alcohol Use

The Second Circuit's approach in *Swedenburg* requires state liquor control schemes to be rational exercises of power pursuant to the purpose of the Twenty-First Amendment. It necessarily looks to a state's regulatory structure to find meaning for any particular component subject to challenge.

The Sixth Circuit's logic in *Granholm* starts by treating liquor the same as if it were any other commodity,

like autos, milk, or furniture. If it finds discriminatory treatment of out-of-state-sourced liquor, it defaults to Commerce Clause strict scrutiny.

The Sixth Circuit approach is inconsistent with the language of the Twenty-First Amendment prohibiting importation in violation of the state's laws and ignores the overwhelming medical and economic evidence that liquor is the dangerous drug most affecting American society. Furthermore, it flies in the face of the explosive development of a new distribution technology that threatens to swamp efforts at liquor regulation, the Internet.

Illinois predicates its liquor tax collection system on distributor collection and payment. The Internet can go around it. Under the Sixth Circuit approach, perhaps Illinois could find a way to collect the tax from out-of-state sources. But it would succeed only if *Quill* does not apply, if Congress permits, if presence is not required, and if the Internet shipper can actually be found. It makes a high tax/lower consumption strategy for liquor control virtually a dead letter.

Collection from in-state sources will be more difficult if not impossible. A state cannot police its sales tax collections if Internet delivery to retailers becomes physically possible. The suggestion that the state do more physical audits comparing inventory to sales tax remissions and distributor delivery reports is unrealistic. Illinois has 25,000 retail liquor licensees. Constant physical surveillance of retail sites is not a feasible enforcement option. Physical surveillance of cyberspace is virtually impossible.

If a state predicates underage distribution control on retail carding to determine eligibility, it still may be able to impact diversion to minors if direct shippers are physically

present in the state because the state has much more intimate supervision of how the shippers conduct business. Internet sites can open and close in a click.

Currently, the circuits are split on direct sales of liquor. An Internet industry in liquor looms. Illinois, like other states, has a system that uses inventory controls to tax and monitor retail sales. Undermining the tools of control will not help. Imposing Commerce Clause strict scrutiny for a test of Twenty-First Amendment rational purpose will promote uncontrolled, unregulated liquor sales. If states can effectively regulate the development of this industry, the political branches of government may devise a strategy for dealing with this dangerous product.

CONCLUSION

The judgment of the Second Circuit Court of Appeals in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) should be affirmed and the judgment of the Sixth Circuit Court of Appeals in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) reversed.

Dated: July 29, 2004

Respectfully submitted,

Claudette P. Miller
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4390

Counsel of Record
Counsel for Amici Curiae

APPENDIX

ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION AGENCY MEMBERS
July 7, 2004

REGION 1

Center for Alcohol & Drug Services
Carolyn Ross, Executive Director
1523 S. Fairmount St., PO Box 3278
Davenport, IA 52808
563/322-2667
FAX # 563/322-3671 (D15)
cross@cads-ia.com

Human Service Center
Michael Boyle, President & CEO
mboyle@fayettecompanies.org
P.O. Box 1346, 600 Fayette
Peoria, IL 61654
309/671-8025
309/671-8005 (Administration)
FAX # 309/671-8021 (D05)

P.H.A.S.E.
Jared Kresge, Executive Director
319 South Church
Rockford, IL 61101
815/966-1285
FAX # 815/490-1051 (D08)
jebjudy@mcleodusa.net

REGION 1 (Cont.)

Robert Young Center for Community Mental Health
David Deopere, Ph.D., President
4600 Third Street
Moline, IL 61265
309/779-2051
FAX # 309/779-2555 (D11)

Rosecrance Health Network
Philip Eaton, President
3815 Harrison Avenue
Rockford, IL 61108
815/391-0100 ext. 416
FAX # 815/391-5041 (D12)
eatonp@rosecrance.net

Sojourn House, Inc.
Brenda Bombard, Director
565 North Turner Avenue
Freeport, IL 61032
815/232-5121
FAX # 815/233-4591 (S029)

REGION 2

Resolve Center
Dr. James Simone, Executive Director
411 W. Division
Manteno, IL 60952
815/468-3241
FAX # 815/468-5463 (S003)
jimdoc21 @hotmail.com

REGION 2 (Cont.)

Breaking Free, Inc.
Mike Moran, Executive Director
120 Gale Street
Aurora, IL 60506
630/897-1003
FAX # 630/897-1042 (S054)
mjmoran@bigfoot.corn

Family Service & Community Mental
Health Center for McHenry Country
Robert Martens, Executive Director
Barb Schmiege, VP for Sub. Abuse Srvcs.
bschmiege@familyservicemch.org
5320 West Elm Street
McHenry, IL 60050
815/385-6400
FAX # 815/385-8127 (D17)
famserv@stans.com

Leyden Family Service & MHC
Dennis P. Vaccaro, CEO
10001 Grand Avenue
Franklin Park, IL 60131
847/451-0330
FAX # 847/451-1652 (S052)
dpvaccaro@aol.com

Renz Addiction Counseling Center
Jerry Skogmo, Executive Director (x232)
Two American Way
Elgin, IL 60120
847/742-3545
FAX # 847/697-5583 (S051)
jskogmo@aol.com

REGION 2 (Cont.)

Stepping Stones, Inc.
Peter McLenighan, Exec. Director (x125)
pmclenighan @steppingstonestreatment.com
Paul Lauridsen, Clinical Director (x103)
plauridsen@steppingstonestreatment.com
1621 Theodore Street
Joliet, IL 60435
815/744-4555
FAX # 815/744-4670 (S055)

Aunt Martha's Youth Service Ctr.
C. Gary Leofanti, Exec. Director
Warren Wood, Division Manager
wwood@auntmarthas.org
233 W. Joe Orr Road (North Bldg)
Chicago Heights, IL 60411
708/754-1044
FAX # 708/747-3497 (D16)

Will County Health Department
Dr. Joseph Troiani, Director
Randy Bultman, Interim Manager
501 Ella Avenue
Joliet, IL 60433
815/727-8521
FAX # 815/727-8436 (D18)
jtroiani@willcountyhealth.org

REGION 3

Central East Alcoholism and Drug Council
Pam Irwin, Ph.D., Executive Director
635 Division, PO Box 532
Charleston, IL 61920
217/348-8108
FAX # 217/345-6794 (S038)
ceadpam@hotmail.com

Chestnut Health Systems, Inc.
Rev. Russell J. Hagen, Pres./CEO
1003 Martin Luther King Drive
Bloomington, IL 61701
309/827-6026 ext. 2200
FAX # 309/820-3574 (D28)
rhagen@chestnut.org

Great River Recovery Resources
Ron Howell, Exec. Director
428 S. 36th Street
Quincy, IL 62301
217/224-6300
FAX # 217/224-4329 (D36)
info@recoveryres.org

Human Resource Center
Kenneth Polky, Executive Director
P.O. Box 1118, 753 E. Court
Paris, IL 61944
217/465-4118
FAX # 217/463-1899 (D38)
kenneth.polky@hrcec.org

REGION 3 (Cont.)

Illinois Alcohol & Other Drug Abuse
Professional Certification Association
Bill Johnson, Executive Director
1305 Wabash Avenue, Suite L
Springfield, IL 62704
217/698-8110
FAX # 217/698-8234 (S078)
iaodapca@aol.com

Prairie Center Health Systems, Inc.
Patrick Leary, CEO
718 Killarney
Urbana, IL 61801
217/328-4500
FAX # 217/328-4535 (S050)
pleary@mail.prairie-center.com

Prevention First, Inc.
Karel Ares, Executive Director
2800 Montvale Drive
Springfield, IL 62704
217/793-7353 or 800/252-8951
FAX # 217/793-7354 (D39)
Chicago Office
720 N. Franklin Street, Suite 500
Chicago, IL 60610
312/988-4646 or 800/572-5385
FAX # 312/998-7096
aresk@prevention.org

REGION 3 (Cont.)

Project Oz
Peter Rankaitis, Executive Director
peter@projectoz.org
Nancy Wisted, Dir., Drug Education
502 South Morris
Bloomington, IL 61701
309/827-0377
FAX # 309/829-8877 (SO43)

Schuyler Counseling & Health Services
Francis "Kip" Wilson, Director
127 S. Liberty, P.O. Box 320
Rushville, IL 62681
217/322-4373
FAX # 217/322-2138 (SO45)
kipwilson@starband.net

Shelby County Community Services
Dick Gloede, CEO
Cheri Fiala, Program Coordinator
1810 W. S. 3rd Street, P.O. Box 650
Shelbyville, IL 62565
217/774-5587
Fax # 217/774-1400 (S083)
sccsaoda@consolidated.net

The Wells Center
Bruce Carter, Exec. Director
1300 Lincoln Avenue
Jacksonville, IL 62650
217/243-1871
FAX # 217/243-2278 (D40)
bcarter@wellscenter.org

REGION 4

Franklin-Williamson Human Services, Inc.
Dr. David Melby, Administrator
902 West Main
West Frankfort, IL 62896
618/997-5336 ext. 7100
dmelby@fwhs.org
Wendy Bailie, Substance Abuse Services Division Director
1307 West Main St., PO Box 365
Marion, IL 62959
618/997-5336 ext. 6108
FAX # 618/993-2969 (S006)
wbailie@fwhs.org

Human Service Center
Gary Buatte, Executive Director
10257 State Route Three
Red Bud, IL 62278
618/282-6233
FAX # 618/282-6220 (S082)
g.buatte@humanservicegroup.com

REGION 5

Addiction Counseling & Educational Service (A.C.E.S.)
Mary Ellen Flynn, Director
721 N. LaSalle Drive
Chicago, IL 60610
312/655-7453
FAX # 312/335-9853 (D19)
mflynn@catholiccharities.net

REGION 5 (Cont.)

Alternative Schools Network
Jack Wuest, Exec. Director
1807 W. Sunnyside, Suite 1D
Chicago, IL 60640
773/728-4030
FAX # 773/728-3335 (S009)
jwuest@altschools.net

Bobby E. Wright Comprehensive
Behavioral Health Center, Inc.
Lucy Lang-Chappell, Ph.D., Exec. Dir.
Geraldine Katovich, Administrator
Program Manager
Nine South Kedzie Avenue
Chicago, IL 60612
773/722-7900
FAX # 773/722-0644 (S056)

Central States Institute of Addiction Programs
Kevin Doyle, Executive Director
120 West Huron Street
Chicago, IL 60610
312/655-7530
FAX # 312/266-9027 (SO11)
kdoyle@catholiccharities.net

REGION 5 (Cont.)

Cornell Interventions, Inc.
Leslie Balonick, Regional Vice President
Terri Matthes, Regional Director
901 W. Jackson Blvd., Ste. 400
Chicago, IL 60607
312/421-0817
FAX # 312/421-6425 (S092)
lbalonick@cornellcompanies.com
tmatthes@comellcompanies.com

Gateway Foundation, Inc.
Michael Darcy, Pres/CEO (ext.216)
mdarcy@gatewayfoundation.org
Nick Gantes, Vice President, IL
ngantes@gatewayfoundation.org
312/913-2324
819 S. Wabash, Suite 300
Chicago, IL 60605
312/663-1130 (Administration)
FAX # 312/663-0504 (S017)
Springfield Office
413 E. Adams
Springfield, IL 62701
217/544-2040 ext. 104
FAX # 217/544-2188 (S081)

Healthcare Alternative Systems
Marco Jacome, Exec. Director
2755 West Armitage Avenue
Chicago, IL 60647
773/252-3100
FAX # 773/252-8945 (5019)
hascares@aol.com

REGION 5 (Cont.)

Human Resources Dev. Inst.
Dr. Terra Thomas, President & CEO
222 S. Jefferson Street
Chicago, IL 60661
312/441-9009
FAX # 312/441-1663 (S020)
hrdi@hrdi.org

Illinois Association of Extended Care
Sterling Gildersleeve, Chairman
P.O. Box 269180
Chicago, IL 60626
708/224-2445
FAX # 773/764-1866 (R10)
iaecrecovery@aol.com

Lutheran Social Services of Illinois
Rev. Frederick Aigner, President
1001 Touhy Avenue, Ste. 50
Des Plaines, IL 60018
847/635-4600
Fax # 847/635-6764 (S023)
Rev. Roger A. Boekenhauer
Exec. Dir. Behavioral Health Services
4840 W. Byron
Chicago, IL 60641
773/282-7347 ext. 281
Fax # 773/282-9013 (S024)
roger.boekenhauer@lssi.org

REGION 5 (Cont.)

PEER Services, Inc.
Kate Mahoney, Executive Director
906 Davis Street
Evanston, IL 60201
847/492-1778
FAX 847/492-0320 (S021)
peer_services ameritech.net

Omni Youth Services
Jay Meyer, Associate Executive Director
jmeyer@omniyouth.org
1111 Lake Cook Road
Buffalo Grove, IL 60089
847/353-1750
FAX # 847/541-0228 (S027)

Pillars Community Services
John Shustitzky, Executive Director
6120 South Archer Road
Summit, IL 60501
708/458-6920
FAX # 708/458-2326 (SO49)
jshustitzk@pillarscommunity.org
Jerri Allers
Director, Prevention Task Force
100 W. Cosset
La Grange, IL 60525
708/352-1188
Fax # 708/352-1198 (S034)
taskforce@earthlink.net

REGION 5 (Cont.)

South East Alcohol & Drug Abuse Center
Greg Zyvert, Exec. Director
8640 S. South Chicago Avenue
Chicago, IL 60617
773/731-9100 ext. 232
FAX # 773/731-1292 (S030)
gzyvert@seadac.org

South Suburban Council on Alcoholism
Allen Sandusky, President/CEO
1909 Checker Square
East Hazel Crest, IL 60429
708/647-3333
FAX # 708/957-2614 (S031)
allensandusky@ameritech.net

Specialized Assistance Services (SASI)
Doris Reynolds, Exec. Director
2101 South Indiana Ave, 2nd Floor
Chicago, IL 60616
312/808-3218
FAX # 312/791-9037 (S039)
sasichgo@earthlink.net

TASC, Inc.
Melody Heaps, President (ext. 203)
1500 North Halsted, 2nd Floor
Chicago, IL 60622
312/787-0208 ext. 203 or 800/621-8076
FAX # 312/787-8214 (S033)
mheaps@tasc-il.org
nreyes@tasc-il.org – Admin. Assistant

YMCA Network for Counseling & Youth Development
of Greater Chicagoland
Peter Sari, Interim Executive Director
3801 W. 127th
Alsip, IL 60658
708/385-6700
FAX # 708/385-6770 (S005)
petersari@hotmail.com